

LIBRARY

SUPREME COURT, U. S.

Office-Supreme Court, U.S.

FILED

JAN 9 1965

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964.

No. 240

LOCAL UNION NO. 189, ETC., AMALGAMATED MEAT
CUTTERS AND BUTCHER WORKMEN OF NORTH
AMERICA, AFL-CIO, ET AL.,

Petitioners.

vs.

JEWEL TEA COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT.

GEORGE B. CHRISTENSEN,

FRED H. DAUGHERTY,

38 South Dearborn Street,

Chicago, Illinois 60603,

THEODORE A. GROENKE,

SAMUEL WEISBARD,

111 West Monroe Street,

Chicago, Illinois 60603,

Attorneys for Respondent.

INDEX.

	PAGE
Statutes involved	1
Question presented	2
Statement	4
Nature of the industry	5
The origin of the restraint on "Operating Hours" ..	5
Evening shopping	8
Product discrimination	10
Action of the Court of Appeals	11
Erroneous factual assumptions of petitioners and Solicitor General	12
1. The restraint neither limits nor fixes hours of work	12
2. No necessity for night work	13
3. The mythical "Labor Objectives" advanced in support of the restraint	19
The negotiations on night hours	22
The evidence as to interference with business competition	24
Summary of argument	28
Argument	30
Introductory	30
I. The market operating hours clause violates the Sherman Act	33
A. The "Sherman Act" applies to all contracts, combinations and conspiracies of labor unions to restrain competition in the product market; only contracts of activities directly concerning wages and conditions of employment are exempted by either the Clayton or the Norris-LaGuardia Act	33

B.	In construing and applying the labor exemption this Court has never permitted it to extend beyond contracts and agreements with employers, or unilateral activity, directly concerning terms and conditions of employment	38
II.	The labor exemption as now construed has not hampered multi-employer collective bargaining as to terms and conditions of employment. Any further relaxation of the Sherman Act would be to the vast detriment of the public	46
III.	The proposals of the Solicitor General have no basis in law, would be unworkable and invite abuse. In any event, when applied to the facts in the instant case they require affirmance of the Court of Appeals decision	49
IV.	The National Labor Relations Board has no primary jurisdiction over the controversy ..	54
	Conclusion	55
	Appendix	57

CITATIONS.

Cases.

Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797 (1945)	28, 29, 30, 31, 32, 39, 40, 41, 42, 43, 44, 45, 47, 51
Allen Bradley Co. v. Local Union No. 3, 164 F. 2d 71 (2d Cir. 1947)	43
Allen Bradley Co. v. Local Union No. 3, 41 F. Supp. 727 (1941)	42, 47
Apex Hosiery Co. v. Leader, 310 U. S. 469 (1940)	31, 34, 39, 40
Brotherhood of Carpenters v. United States, 330 U. S. 395 (1947)	35
Coronado Coal Co. v. United Mine Workers, 268 U. S. 295 (1925)	31
Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921)	31
Fibreboard Paper Products Corporation v. N. L. R. B., No. 14 This Term	31, 45
International Brotherhood of Teamsters v. Oliver, 358 U. S. 283 (1959)	31, 45, 53
Local 167 v. United States, 291 U. S. 293 (1934)	39
Loewe v. Lawlor, 208 U. S. 274 (1908)	34
Maryland and Virginia Milk Producers Assoc. v. United States, 362 U. S. 458 (1960)	38
Sinclair Refining Company v. Atkinson, 370 U. S. 195 (1962)	36
Telegraphers v. Chicago & N. W. R. Co., 362 U. S. 330 (1960)	31, 45

Textile Workers Union v. Lincoln Mills, 353 U. S. 448 (1957)	48
United Mine Workers v. Coronado Coal Co., 259 U. S. 344 (1922)	31
United States v. Brims, 272 U. S. 549 (1926)	28, 31, 34, 38, 39, 40, 45, 47
United States v. Employing Lathers Ass'n., 347 U. S. 198 (1954)	44, 47
United States v. Employing Plasterers Ass'n., 347 U. S. 486 (1954)	44, 47
United States v. Hutcheson, 312 U. S. 219 (1941) ..	31, 39, 40

Statutes.

Clayton Act, 38 Stat. 730, 15 U. S. C. 12 et seq.	28, 35, 36, 37, 41, 53
Sec. 4, 15 U. S. C. 15	1
Sec. 6, 15 U. S. C. 17	36
Sec. 16, 15 U. S. C. 26	2
Sec. 20, 29 U. S. C. 52	36, 39
National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. 151 et seq.	35, 36
Sec. 3 (d), 29 U. S. C. 153 (d)	2
Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. 101 et seq.	28, 35, 36, 37, 41, 53
Sec. 1, 29 U. S. C. 101	36
Sec. 2, 29 U. S. C. 102	37
Sec. 13, 29 U. S. C. 13	36-37
Sherman Act, 26 Stat. 209, 15 U. S. C. 1 et seq.	28-30, 32-36, 41

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964.

No. 240.

**LOCAL UNION NO. 189, ETC., AMALGAMATED MEAT
CUTTERS AND BUTCHER WORKMEN OF NORTH
AMERICA, AFL-CIO, ET AL.,**

Petitioners,

vs.

JEWEL TEA COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT.

STATUTES INVOLVED.

Provisions of the Clayton and National Labor Relations Acts pertinent to petitioners' contentions are omitted from the briefs of petitioners and the United States. They are:

1. *The Clayton Act* (38 Stat. 731, 15 U. S. C. § 15):

“4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.”

2. *The Clayton Act* (38 Stat. 737, 15 U. S. C. § 26):

"16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, * * *"

3. *National Labor Relations Act, as amended* (61 Stat. 139, 29 U. S. C. § 153(d)):

"(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. * * * He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."

QUESTION PRESENTED.

The grant of certiorari was limited to two questions raised by the Unions' petition, namely: (1) whether the restraint of trade in issue is within the labor exemption from the Sherman Act because indulged in by the Unions for what they conceived to be the interest of their members; and (2) whether, because collective bargaining is involved, the National Labor Relations Board should have exclusive primary jurisdiction.

The first question was euphemistically stated in the Unions' petition so as to embrace an overturned conclusion of the District Court that the trade restraint, "Market operating hours shall be 9 A. M. to 6 P. M., Monday through Saturday inclusive," is a regulation of "how long and what hours [Union] members shall work, what they shall do, and what pay they shall receive." This conclusion was overturned by the Court of Appeals because it does not

accord with the facts which show that hours of work, work jurisdiction and rates of pay are fully and comprehensively fixed by other provisions of the contract (R. 42 *et seq.*). The hours, working conditions and rates of pay of butchers in no way have been, or will be, changed by any order entered in this case, for respondent does not attack, nor did the Court of Appeals purport to pass upon, those provisions of the contract (R. 42 *et seq.*) which define the hours butchers shall work (Art. 4, R. 49), their work "jurisdiction" (Art. 2, R. 46)¹ or their rates of pay (Art. 3, R. 48). This is clear from the contracts and has been officially announced by the Unions since the case has been pending in this Court. This Union announcement, appended to our Brief in Opposition, is reproduced as an Appendix hereto. All that is at issue is whether the Chicago public may make self-service purchases of fresh meat, on which the butchers have fully performed their tasks, after the hour of 6:00 P. M.

Conformed to the facts of this record, the question as to the labor exemption is as follows:

1. May substantially all meat market operators and unions representing all of the trained butchers in a large trading area go beyond joint bargaining as to the hours butchers shall perform their tasks and contract

1. Although the self-service contract, doubtless because of a carry-over of the traditional language from the service market contracts, states, *inter alia*, that the butchers have jurisdiction over the "sale" of meat, the parties consistently have construed it otherwise as applied to self-service markets. In such markets the actual sale, in the legal sense, is not made until the customer has carried his meat to the store "checker" or cashier, a member of another bargaining unit, who "checks" the price and collects the required amount. Until that moment the purchase has not been consummated, title has not passed, and the customer is at complete liberty to change his mind (R. 137-138, 551-552). The "checkers" or cashiers are in a different bargaining unit (R. 138) and regularly work evenings (in stores open in the evening) to collect for grocery department items and those items, such as fresh poultry, within the butchers' "jurisdiction" but which, unlike fresh red meat, are not subjected to the 6:00 P. M. restraint.

and combine to prevent any market operator from permitting members of the public to make self-service purchases of meat, pre-packaged by butchers, except within hours limited by the combination?

The difference in statement of the question is of critical importance because, as will become apparent in this brief, while we differ to some degree with the ultimate legal conclusions advanced by the Solicitor General our basic difference with him is as to his assumptions of fact. It is our contention that the rationale and fundamental concepts underlying the Solicitor General's legal postulates applied to the actual facts of this case, necessitate an affirmance rather than a reversal of the Court of Appeals' decision.

STATEMENT.

Although the facts are largely undisputed, the District Court's overturned opinion does not state them correctly. Nevertheless, petitioners' brief, in large part, and the Solicitor General's almost entirely, rely upon the District Court's conclusions or summaries of the facts rather than upon the record itself or upon the Court of Appeals' contrary finding that the evidence "sustains the material allegations of the complaint." The Court of Appeals wholly swept aside the District Court's erroneous conclusions that the restraint was solely for labor objectives, that self-service markets could not be operated at any time without butchers on duty and that the restraint was reasonable. Thus both petitioners' and the Solicitor General's briefs are falsely premised. The case must proceed here on the basis that the complaint was proved.

NATURE OF THE INDUSTRY.

This case grows out of the development within recent years of modern refrigeration devices and plastic wrapping materials which make it possible to prepare retail cuts of meat in advance of their purchase, wrap them in transparent wrappers, and lodge them in open refrigerated cases where buyers may see and select the cuts they desire even though no butcher is on duty near the cases. This system of marketing was a physical impossibility until 15 or 16 years ago (R. 118).

Until 1948, meat was vended at retail in the Chicago area under the time-honored system by which a butcher cut from a partially cut up carcass the portion of meat desired by the customer, wrapped it, and gave it to the customer, who either paid the butcher or the store cashier (R. 157).

THE ORIGIN OF THE RESTRAINT ON "OPERATING HOURS."

Although the term "market operating hours" is not officially defined in the record, we believe it will be agreed that it means hours in which customers may make purchases. Despite the limitation in issue, the markets are permitted, under the contracts, to "operate" in the sense that butchers may cut and prepare meat before and after the stipulated "operating hours" provided they do so "behind locked doors" (Art. 4, Sec. 4, R. 50).

The Solicitor General, relying on an erroneous conclusion of the District Court, says that the *limitation upon marketing hours* originated after a strike in 1919; that since that time the collective bargaining agreements always have included a provision limiting working and marketing hours (S. G. 5).² This is not so. The 1920 contract, which

2. We use the letters S. G. to refer to the brief filed by the Solicitor General.

followed that strike, contained *no restriction per se* on market operating hours (D. Ex. 40, 115x). That restriction did not come into existence until 1947 (D. Ex. 40 H, Art. III(c), 128x). Prior to that time the contracts had simply provided:

"It is expressly understood that no customers will be served who come into the market after 6:00 P.M. and after 9:00 P.M. on Saturdays and on days preceding holidays."

Whether the small markets, prevalent in the 1920's and 1930's, in which the owner, not subject to the union contract, frequently worked alone, or sometimes with employed butchers (R. 106), were actually closed down at 6:00 P.M. and 9:00 P.M., or whether merely such workmen as were unionized went off duty at those hours, the record does not show.

Jewel commenced operating meat departments in 1934 (R. 313); they were operated upon the traditional service method until September, 1948. Since Jewel relied entirely on hired, union butchers to serve meat customers, the hours of work clauses together with the clause restricting hours within which union members would serve customers were sufficient, prior to 1948, to control the hours during which meat might be purchased. However, under a self-service system in which it is not necessary that the customer be "served" by, or have any direct contact with, the butcher (R. 118), a new clause was imposed to meet the anticipated self-service system which Jewel was investigating and advocating (R. 157). Consequently, in 1947 the restrictive clause at bar,

"Market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive",

was put into the contracts.

The District Court wholly misapprehended and garbled the foregoing facts when it stated that a restriction on market operating hours as such had been in existence since 1920 (R. 662) but yet made the contrary remark that night work was not eliminated until 1947 (R. 672). Neither assertion is correct.

In 1948 Jewel introduced the self-service system into the outer suburban area (R. 157). The initial operations were highly successful and the system was extended into Chicago proper in 1953 (R. 157).

No counter service by butchers is necessary in a self-service market. However, such service may be provided by the retailer as an additional marketing attraction for customers who want special cuts not found in the self-service cases, or want advice from a butcher in connection with their purchases. Under the contracts this is referred to as "semi-self-service" (R. 45) and is the type of operation preferred by most operators, for purposes of rates of pay, hours and working conditions "semi-self-service" markets are treated and referred to as "self-service."

The self-service system has had wide public acceptance (R. 157-158). A survey made by the unions of eight chains competing with respondent in the Chicago area disclosed a marked increase between September 1957 and January 1962 in their self-service markets, accompanied by a marked decrease in service markets, *but with an increase in employment of butchers*. And the unions, as the Court of Appeals' first opinion foresaw (274 F. 2d at 221) might be the case, are bigger, stronger and wealthier than they ever were (R. 616). The figures as to those Chicago stores are tabulated below from D. Ex. 8, 34x:

	1957	1962
Self-Service Markets.....	262	377
Service Markets.....	238	83
Butchers Employed.....	1032	2050

Among the advantages of self-service and longer hours is the fact that both reduce the capital cost per item sold (R. 157, 158). Self-service also results in sale of a greater portion of the whole carcass than does the older system. This is because in service markets many customers, not being familiar with all cuts of meat, tend to request a few well-known cuts, with the result that other parts of the carcass may become surplus or unsalable. Under self-service, virtually the entire edible carcass is displayed in attractive cuts, many of which customers would not know about, or think to order, in a service market. As a result of these savings, waste is decreased and the return from the carcass as a whole is increased, so that the overall price to the customer may be reduced. Additionally the customer does not have to wait for service, can see in advance, and compare with other cuts, the piece she is interested in, and does not have to declare a preference for an inexpensive cut within the hearing of her neighbors (R. 158-159).

EVENING SHOPPING.

Coincidentally with the development of self-service there also has arisen public demand for evening shopping hours (R. 313-315). This has resulted in part from the spread of population to suburban areas in which use of an automobile is a virtual necessity for shopping purposes.—Approximately 66% of the public in Chicago and the immediately surrounding area use an automobile when shopping for food; 56% of the public does not ordinarily have a car available for shopping purposes during daytime hours Monday through Friday (P. Ex. 17 at 29x).

Since there are many families in which both the husband and wife work, or in which the family automobile is not available for shopping purposes during normal daytime hours, shopping must be done in the evening or else on Saturday for the entire ensuing week. A computation from

U. S. Census figures shows that there are approximately 807,000 husbands and wives in the Chicago Metropolitan area in households in which both are employed (P. Ex. 18 C, 31x). As a result of these factors, in most neighborhoods food stores are open one or more evenings a week.

Although grocery departments of these stores are open during evening hours and fresh poultry and certain processed meats (all within the "jurisdiction" of the meat cutter unions) may be purchased, fresh red meat, by reason of the restraint complained of, cannot be purchased even though it is available in self-service cases. Over those cases a sign is posted at 6:00 P.M. reading, "Pursuant to agreement with Amalgamated Meat Cutters, market closed after 6:00 P.M." (P. Ex. 3, 4x.) The meat is visible, within arm's reach, but untouchable (R. 164, 318, 322).

Typical, representative and independent householders from various portions of Cook County testified that for various family or transportation reasons it was extremely difficult to shop during the day and that their inability to buy meat at night imposed hardships and caused them to buy less meat than they otherwise would (R. 317-327). A scientific poll made in November 1962 by a firm specializing in determination of market facts disclosed that 19% of Chicago area families had been compelled from time to time to shift their menus to unsatisfactory substitutes for meat because of inability to buy meat at night, and 34% were inconvenienced by such inability (P. Ex. 17 at 29x).

The conditions in the Chicago area which make it desirable that the public not be denied access to supplies of fresh meat during evening shopping hours are, of course, duplicated in many areas throughout the country. The result is that throughout the country as a general proposition evening sales of meat take place at such hours as the operators find suitable (R. 460-463). The only areas in which there are restraints comparable to the Chicago re-

straint are the Cleveland (D. Ex. 22), Seattle (D. Ex. 25), and Butte, Montana (D. Ex. 28) areas. In the St. Paul area evening sales are permitted, but only to the hour of 9:00 P.M. on five days a week (D. Ex. 30). As a result, the tremendously populated Chicago area stands out, as union officer Kelly confesses, "like a sore thumb with no night operations" (R. 115-116). The bland statement in the District Court's Memorandum that restraints similar to the one at bar "are in operation in other metropolitan areas" disguises, rather than fairly depicts, the record which demonstrates the public convenience that would result from unimpeded competition.

PRODUCT DISCRIMINATION.

On the subject of whether the restraint is, as the unions assert, a device to protect working conditions or is an effort to regulate competition, the record shows it does not embrace all products now and traditionally handled by butchers. In this respect, the following evidence is relevant:

The unions assert "jurisdiction" over "all fish, poultry, rabbits, meats and its kindred products, fresh or frozen." Poultry is a major item in butchers' work and in store sales. Yet it is exempt from the night ban. The reason for exempting it was that employers requested "the right to sell this [fresh] poultry because it was being sold as frozen poultry, by delicatessens and small 'Pop and Mama' stores who were in direct competition to them." (R. 613, 600.) In other words, when competition by competitors outside the combination became effective, the ban on marketing hours was lifted in the area (poultry) in which the outside competition was making itself felt.

And competition *within* the contracting group was also regulated and evened to a comfortable level. Thus when the

unions gave permission to one party to the contracts to apply certain wrappings to ham off the premises, "in fairness to *competition*" they extended the same privilege to other employers (R. 116).

ACTION OF THE COURT OF APPEALS.

Acting upon the foregoing and other evidence, the Court of Appeals found that the action of the District Court in holding respondent had failed to prove its complaint was erroneous. While it did not deal with the various assertions of the District Court's Memorandum piecemeal, it pointed out that there were no factual disputes revealed by the evidence, and no question as to credibility on any relevant issue; that the evidence sustained the material allegations of the complaint, and that its "holding of the law [on the first appeal] on the facts as stated in the complaint we now adopt as our holding of the law as applied to the evidence upon remand" (331 F. 2d at 548). As to the District Court's conclusion that the restraint represented "conditions of employment" it held squarely, "we cannot agree" (331 F. 2d at 549).

It will be seen that what is involved is essentially a question of law as to whether, on the undisputed facts of this record, the District Court was correct in declaring that the market operating hours restriction was a term and condition of employment within the meaning of the labor exemption to the Sherman Act, or whether the Court of Appeals was correct in its holding that while the hours a self-service market is open for purchases of meat by the public "may incidentally affect its employees as will almost anything it does," such hours do not establish a term or condition of employment, nor is regulation of them necessary to protect hours of employment.

ERRONEOUS FACTUAL ASSUMPTIONS OF PETITIONERS AND SOLICITOR GENERAL.

1. The Restraint Neither Limits Nor Fixes Hours of Work.

The assumption throughout the Solicitor General's brief that hours at which meat is sold at retail "are historically and functionally related to hours of work" is contrary to fact. Butchers have always been permitted to work overtime "behind locked doors" even in service markets (D. Ex. 40, 115x). Since 1948, when the self-service method of meat retailing was introduced, the connection between hours when meat is sold and working hours has become even more tenuous. The "functioning and history" of butchers under the self-service system, cutting and wrapping meat in a back room (R. 118), necessarily is quite different from the butchers' "functioning and history" in the old service markets in which a butcher stood at the counter, at the customer's request cut a portion of meat, prepared and weighed it and collected the money.

The Solicitor General's theory (S. G. 26) that "the marketing hours clause * * * fixes the employees' work schedules" or that it "directly affected" hours of work is wholly contrary to the undisputed record and to the Court of Appeals' observation in its first opinion that the right to set marketing hours, under the facts of this case, is not a "direct, frontal attack" upon working hours (274 F. 2d at 221).

The *market operating hours* clause (R. 51) provides that markets may be open for 54 hours a week, viz., for six 9-hour days, whereas the *hours of work* provisions (R. 49) provide for a regular work week of five 8-hour days. The *market operating restriction* fixes neither the minimum nor maximum hours, nor the times, nor particular days of an employee's *work schedule*, for the contract provides that butchers may work before, or after, the 54 hour mar-

keting schedule, provided they do so "behind locked doors" (R. 50). Their work may commence as early as 8:00 in the morning and extend (at premium rates) to whatever hour at night after 6:00 p.m. the employer, in his "discretion," believes necessary (Art. 4, Sec. 4, R. 50). Market operating hours and working hours thus are wholly different and have not been the same for many years. In short, while the contract places an absolute bar on customers purchasing meat at any time before 9:00 in the morning or after 6:00 in the evening it permits butchers to work both earlier and later.

2. No Necessity for Night Work.

Akin to the erroneous assertion that the marketing hours clause fixes work schedules is a corollary assertion that self-service meat departments cannot be operated during evening hours without employees being on duty therein, from which premise it is asserted that working hours necessarily determine the hours within which purchases may be made. The Solicitor General goes so far as to assert (S. G. 39) that "Marketing hours and working hours for a sales force cannot be separated," and that (S. G. 57) " * * * the scheduling of working hours for retail clerks necessarily determines the hours a store will be open." *Those sweeping generalizations may be true where clerks are required to wait upon customers but are not true as applied to a store vending meats by customer self-service selection. Butchers under self-service³ are not salesmen or*

3. It is to be noted that the contract (R. 45) defines three types of markets: (1) Complete "self-service," (2) "Service" and (3) "Semi-self-service" in which, although meat is made available on a self-service basis, "custom cutting" is offered for those who prefer it. The fact that Jewel prefers, if it can have it, "semi-self-service" for most evening sales, does not detract from its right, under the contracts to offer pure or complete self-service. Nor are petitioners in any position to offer the merchandising opinion that only "Semi-self-service" is practical or possible when their own contracts provide for "Self-service" as well.

clerks at all. Rather they are artisans who, day or night, prepare the meat and leave it in a place where the customer may select it. Their hours of work need no more conform to the hours customers pick up the meat than the hours of work of candy makers need conform to the hours during which the public buys candy bars from automatic vending machines.

The Solicitor General builds his argument by enlarging upon an overturned merchandising opinion of the District Court (R. 672) that it is "*impractical*" to operate without butchers on duty. The District Court's conclusion as to "*impracticality*" was swept aside by the Court of Appeals upon undisputed proof:

(a) That in fact plaintiff does so operate several hours for several evenings each week in its extensive operations in Indiana, not only without customer complaint (R. 243-246, 289-295), but with the ratio of evening meat purchases to evening grocery purchases remaining constant with the daytime ratio (R. 290-294);

(b) That fresh poultry, whole or cut up, and fresh sausage, fully as perishable and delicate as fresh red meat but which, because of competition from outside sources, are exempt from the ban (R. 47, 51-52), are regularly vended at night by the major operators even in Chicago through the same self-service cases in which the meat is reposing; that there is "no faint reason" why fresh red meat cannot be handled in the same way (R. 647). Although petitioners offered alleged "expert" testimony that a meat cutter always *ought* (in their view as to how a store should be run) to be on duty, they offered utterly no evidence as to why it is "practical" to permit self-service purchases of pre-packaged fresh poultry "provided that Union members stock the [self-service] cases before 6:00 p.m.," (R. 47) "but impractical" to do so with fresh red meat.

The Solicitor General is under the mistaken belief that Jewel raised the matter of permitting self-service purchases of meat without butchers on duty for the first time in the closing moments of the 1961 negotiations (S. G. 6, 48). The possibility of sales without butchers or other attendants on duty is apparent from the system of merchandising, and is envisioned by the contracts which provide (R. 45) for pure or complete "self-service," "service" and "semi-self-service" in which meat is made available on a self-service basis, but "custom cutting" is offered for those who prefer it. The possibility was set forth in paragraph 11 of the complaint (R. 20), which was filed July 29, 1958 and which alleged "that there is no necessity for members of the defendant unions being on duty in plaintiff's stores at all hours at which meats are actually purchased by customers; that the incidental tasks of arranging the cuts in the cases * * * need not be performed continuously throughout store hours and can be performed by others *or can be performed by butchers some hours prior to the ending of store hours.*" This was a material allegation of the complaint which the Court of Appeals found was sustained by the evidence (331 F. 2d at 548).

The Solicitor General's brief (pp. 6, 22), misreading the overturned discussion of the District Court, proceeds upon the erroneous assumption that Jewel proposed night operations without butchers being on duty only on November 16, 1961 "as negotiations were 'breaking up'." However, the undisputed record as to 1961 is that on September 29, 1961 the Unions had asked what price the employers would pay for night operations (R. 596); on November 2, 1961, the industry as a whole asked what the union position would be on night sales for three nights a week, if it was assumed that *all* provisions of a contract had been settled except market operating hours (R. 535). The

Unions took a 35 minute recess and then answered that to negotiate night hours on the limited basis of three nights a week "would be conspiring with a group of employers to limit operations to certain nights";⁴ that the Unions were willing to negotiate for seven days a week, 24 hours per day of operation (record erroneously reads 20 hours); that only if *all* employers would present such a demand would the Union react with a demand covering such a request (R. 536).

Further negotiations were held on November 3 and 13, 1961 (R. 537). On November 13, Jewel made the November 2, 1961 proposal on behalf of itself alone (R. 538, P. Ex. 10). What actually took place at the final meeting on November 16, 1961 (R. 539) was not the belated presentation of the proposal but a request by Jewel, "as we were breaking up" (R. 543), that its proposals for night operations either with or without butchers on duty be put to the Union membership regardless of whether the Union officers recommended them. A comment in the District Court's Memorandum, erroneously relied on by the Solicitor General (S. G. 48), that defendant Unions "questioned the seriousness of that proposal under the circumstances" (R. 667) was an egregious invention by the District Court without a syllable of evidence to support it.

The facts were that the matter had been agitated seriously for years; this suit was pending to determine it; and the Unions regarded it so seriously that Union officer Kelly fully explained it to the membership on November 26, 1961 (R. 596, 598) which then voted upon the proposals; Jewel's offer number 1 (see P. Ex. 10, 19x, also set forth Pet. br. p. 41), which in substance provided for night self-service

4. It may incidentally be observed that this response exposes the unexplained and inherent self-contradiction of petitioners' position, viz., it would be "conspiring" to limit night operations to three nights a week but it is not "conspiring" to cut them off completely! (R. 555).

purchases at such hours as Jewel saw fit without butchers being required to be on duty after 6:00 P. M. and with a guaranty that no other employees would be permitted to stock or rotate the meats in the self-service cases, was rejected. Jewel's offer number 2 (P. Ex. 10, 20, 19x), which provided for elimination of the night ban in both service and self-service markets, forbade employees other than members of the Meat Cutters to stock or rotate meats, provided for time and one-half for all work after 6:00 P. M. on Mondays through Saturdays, and required that a journeyman meat cutter be on duty at all hours that fresh meat was offered for purchase, was likewise rejected.

As Mr. Kelly twice put it, the Unions voted to "accept" the proposal of the other employers that the ban on night purchases be continued (R. 598, 138-139). This was in conformity with the long-standing policy of the Unions that all of the industry should conform on the pattern as to hours of competition regardless of whether employees did or did not work; that it was unethical for Jewel to seek different hours. As Mr. Kelly put it:

"A. I was attempting to point out that it had been a part of the industry group throughout the entire negotiations—the majority of the industry—that they had seen fit to accept the union contract proposal, and in view of that it was our view that Jewel should not be in any different position. That was the position of all of the contract negotiators.

"Q. And that is all that the union and the industry would conform on the pattern as to hours of competition?

"A. Once the agreement was reached between the majority, yes, sir, that is correct.

"Q. And that would govern the hours of competition in the sale of meat in Chicago?

"A. That is correct, sir." (R. 123-124.)

Petitioners assert in their Statement (p. 50) that some "expert opinion" holds that fresh red meat cannot be "satisfactorily" sold in a self-service meat department without employees on duty because: (a) in handling packages customers may disarrange or tear them; (b) the cases may become depleted; (c) there is no one to assist the customer in selecting meat or to advise as to its preparation. This is a question of business judgment rather than a question of law; it is not up to Courts to tell merchants how to run a store. Moreover it is irrelevant opinion, not fact. However, the opinions tendered by the unions were without validity. Meindel admitted he had "no knowledge" as to Jewel's night operations (R. 471) and expressed merely a "personal opinion" (R. 451); Kokalis was utterly without experience in night operations without help on duty and agreed that his opinion was "far less valuable than that of men who have actually witnessed such an operation" (App. 419) such as Jewel's Operating Manager Brewer (R. 163) or Manager Mayer (R. 643-647). Jewel's views as to market practices are those of a superior market operator for its ratio of meat to grocery sales very substantially exceeds the national average—the "whole success of Jewel has been built around their [meat] markets" (R. 147-149, 463-464). Moreover, as one of petitioners' supposed "experts" admitted the customer is the one who finally determines, by his patronage or lack of patronage, whether an operation is satisfactory (R. 469-470). This was pointed out in the first opinion of the Court of Appeals (274 F. 2d at 221).

The lack of factual merit, indeed the irrationality, of the claims that markets cannot operate in the evening without butchers on duty, and the accompanying contention that the restriction on market operating hours arises solely from the desire of Chicago butchers not to work at night, is demonstrated by the simple fact that *if* markets could not operate

at night without butchers (or other attendants on duty), there is nothing to fear from Jewel's desire to so operate, for the operation would quickly fail. So far as the butchers' asserted desire not to work nights is concerned, there is no power on earth (under the laws of this country) that can compel butchers to work when they do not wish to, nights or daytimes, and the Unions so boast (See Appendix).

3. The Mythical "Labor Objectives" Advanced in Support of the Restraint.

In the Statements of petitioners, and the Solicitor General, and woven into their Arguments in support of their contention that the restraint on evening sales is a "term or condition of employment" are the following assertions, each of which is factually erroneous:

a. The market limitation fixes hours of employment: (Disposed of *supra*, p. 12).

b. A self-service meat market cannot operate at night without employees being on duty to serve customers: (Disposed of *supra*, p. 13).

c. If a self-service market operates at night without butchers on duty, the work load of the butchers during the day would be increased by the necessity of preparing cuts and stocking the cases for evening sales (or restocking them in the morning): Work loads are a bargainable matter. If, because of evening sales, a self-service market appreciably increased its volume so that additional work was required of butchers near the close or opening of a day, Jewel could be required to bargain over increasing the staff so that no individual would be overworked. Stores for many reasons have changes in volume of business and size of staff (R. 613). There is no history of a failure of Jewel to adjust the size of the work force to the quantum of business of any particular store (R. 101).

d. If a self-service meat department were operated without butchers on duty, other employees might usurp a portion of the butchers' work jurisdiction by giving special night service to customers: This theory is advanced by the *Solicitor General* without reference to the evidence and by petitioners under a flat misstatement thereof. The record is undisputed that fresh poultry, a large item in market sales, has been sold, self-service, in Chicago for seven years without history of other employees preempting the butchers' normal work. While union agent Kelly testified generally that as to "delicatessen" items, experience indicated that somebody might rearrange or restock the cases, no factual evidence of such practice was offered.

The law proceeds upon the assumption that all parties proceed lawfully and do not breach their contracts. It no more may be presumed by a union that Jewel would breach a contractual commitment it offered that non-butcher employees would not touch a piece of meat (P. Ex. 10, 19x, R. 138-139) than Jewel may be permitted to say it will not make a contract with a union because it thinks the union will breach it. A contract guaranteeing against invasions of butchers' work could be enforced by an arbitrator or a court.

We heretofore have noted that Jewel has sold meat at night throughout its Indiana territory for several years without butchers being on duty save for nights when demand was heaviest. That actual experience would have produced proof of "cheating" on the butchers' work if such "cheating" had existed. No such proof was available. To meet this deficiency, petitioners, on the eve of trial, sent a disgruntled former Jewel butcher⁵ to Indiana to trap some

5. Walter Santeler (R. 474), who, while employed by Jewel as a market manager, permitted stale meat in his meat cases and adulterated hamburger with cheaper ground up beef hearts. (This would tend to increase his profit showing.) When his offenses were detected and confessed he was given a warning (P. Ex. 22, 33x, R. 652-653) that precluded further advancement. He soon quit his job and went to work for a competitor (R. 496-497).

Jewel employee into giving him a special piece of meat. The entrapper visited three markets. In one of them he asserted he found an apprentice working in the meat workroom, and, posing as a customer, induced him to bring out two special rump roasts, of which he selected one, and later laid it aside. This episode of entrapment is misrepresented in petitioners' Brief (p. 49) as one in which "two part-time grocer clerks" were involved, one of whom brought the roasts "to the customer." Even in the entrapper's questionable testimony, grocery clerks were not involved, but an apprentice butcher who had not yet become a full-fledged meat cutter (R. 495). There is utterly no evidence that any bona fide customer ever received special service.

The speculation in the Solicitor General's Brief (p. 48) that "If the meat department were open while there was no butcher on duty, there would be substantial likelihood that nonbutchers would do butchers' work" accordingly is without support in the record. When the Solicitor General supposes (p. 49) that an especially good customer might ask to have a round steak ground into hamburger, and that the resulting temptation to permit nonbutchers to do the work "would be severe, or so the Union might feel," he is indulging in mere unrealistic imagination. We respectfully suggest that even under the present restriction the round steak actually is in the store during evening hours (for that matter, the hamburger is too); the night manager and various grocery personnel are in the store; and there now is more temptation for someone to grind the round steak (or let the customer take it unground) so that the customer might have meat of some variety, than there would be if night sales of meat were permitted. If Jewel has been able to resist the present temptation, as it has, there is no reason

to believe it would not resist the less impelling temptation the Solicitor General imagines.⁶

The Negotiations On Night Hours.

Petitioners offered much evidence as to the collective negotiations. It is our view that much of this is immaterial, for a contract by businessmen restraining their hours of competition in the face of reasonable public demand for longer hours of access to food is, on its face, as the Solicitor General's brief concedes, a Sherman Act violation. When unions enter into such an illegal contract with businessmen they are not shielded from the antitrust laws even though the contract results from collective bargaining, bilateral or multilateral. The parties have entered into a contract to accomplish an unlawful end, market control or manipulation; they are using lawful means, a contract, to accomplish an illegal end and are therefore guilty of conspiracy within the meaning of the Sherman Act. Nevertheless, because petitioners' brief refers in massive detail to the source of bargaining, some reference to the evidence is necessary for a proper understanding of the record:

Preparatory to the 1957 negotiations, Jewel sent its negotiator, Vorbeck, to call on Charles H. Bromann, Secretary of the trade association, Associated Food Retailers of

6. Another instance of immaterial imaginative matter is the robust declaration (S. G. 29) against "sweated labor." In a case in which the unions boast they "have the keys to the store" (R. 111), where the contracts contain rigid restrictions against work over eight hours a day save at premiums, and with the last one carrying a basic pay of \$134 a week for journeymen (P. Ex. 9 p. 13, 18x), the repetition of a battle cry of a half century ago is mere emotional oratory apropos of nothing in the record. It stands in strange contrast to the Government's inability to shed but a brief and ineffectual tear for the plight of consumers under the restraint at bar who are told, in the face of union declarations that if night operations are to come to Chicago "it will have to be done in court" (R. 115), to look to further fruitless collective bargaining (S. G. 49).

Greater Chicago, Inc.,⁷ in an endeavor to induce Bromann to drop his opposition to night operating hours. Vorbeck accused Associated, which represented some 300 so-called independent operators, as being the principal opponent to evening sales. Bromann did not deny the accusation when it was made even though he was then threatened with what became this lawsuit, nor did the unions ever call him to the stand to do so (R. 558-559).

The District Court's opinion erroneously states that Associated, through Bromann, joined in an all-employer offer of November 15, 1957, demanding the elimination of the restriction. This is not so. On one day only of the 1957 negotiations, Associated, rather than joining in any movement to eliminate the restraint, temporarily joined in a quite different proposal to retain the basic restraint but to soften it to one which would permit operations on Friday nights beginning with the second year of the contract term, with a male attendant to be on duty (R. 396). The record is undisputed that at no point did Associated either denounce, or agree to waive, the restriction in its entirety.⁸

With the matter of operating hours drawn into the bargaining, together with numerous subjects concerning wages, working conditions and fringe benefits, all items concerning efficiency and costs, Jewel was in a position where it was forced as a practical matter to balance evils and costs and settle for what was attainable at any given time or face the catastrophic costs of a strike (P. Ex. 19, 32x) in which it would be standing alone. At each succeeding negotiation after 1957 Jewel pressed for night operations but met only with bafflement (R. 134).

7. Bromann and Associated are petitioners in No. 321, this Term, in which a petition for certiorari has not yet been acted upon.

8. The Solicitor General's belief (S.G. 46) that "Associated opposed this demand [for the marketing clause] and yielded to it only reluctantly," is wholly unfounded.

In 1961, when the union was asked, assuming all other provisions of a contract were satisfactorily settled, under what conditions it would agree to evening sales on three nights a week, it responded that to negotiate on the limited basis of three nights a week would be "conspiring with a group of employers to limit operations to certain nights and certain hours;" that only if the entire industry would be willing to negotiate for seven days each week, twenty-four hour a day (record erroneously reads twenty) operations, would the union react with a demand covering such a request (R. 535-537). In other words, the unions proposed, instead of an industry-wide restraint against evening sales, an industry-wide restraint for continuous operations.

Although the unions profess to assert that market operating hours is a negotiable subject, the evidence shows without dispute they have never taken a position as to what would be a proper price for such operating hours with or without union butchers on duty. Jewel[®] has offered everything from 25¢ or 50¢ a night to time and one-half, but the unions never have engaged in bargaining on the subject (R. 616-617).

THE EVIDENCE AS TO INTERFERENCE WITH BUSINESS COMPETITION.

Since the contracts contain elaborate provisions fixing butchers' working hours and their jurisdiction, it is apparent that the additional provision restricting "market operating hours" was wholly unnecessary if all that was sought by it was to fix hours of labor. In this case, like any other, the conspirators were loath to confess their real objectives. However, the evidence came out bit by bit and shows that the selling hours restriction contributed only one thing to the agreement—it eliminated convenience of shopping hours as an element of competition.

The evidence disclosed that as of 1957 the operators were divided as to whether to operate at night. Bromann, the chief officer of Associated Food Retailers, which represented some 300 operators, by far the largest single block of stores (R. 612), as we have seen, was the principal opponent to evening sales. Any indications from the opposing briefs that Associated ever changed from a position that hours of sale should be regulated is erroneous. The record is wholly clear that, unimpeded by the restraint, at least some operators including, of course, respondent would have met public demand for some evening hours and that the restraint could be effective only with union and majority of industry support.

The evidence that the objectives sought by the unions through the marketing clause was not regulation of hours of employment but regulation of the market and competition and, hopefully, assurance of profits, is clear: One objective was to benefit service markets as against self-service markets by preventing consumers from trading at the latter when service operators might not find it economical to operate. Another was to bring about an industry structure which, or so it was believed, would facilitate the transfer of butchers from the employee to the owner class; still another was to protect "small" operators. Thus union officer Kelly testified:

"Q. Does the relationship of the service market to the self-service market play a part in the unions' opposition to operating a self-service meat department, without employees on duty after 6 P.M.?

"A. Yes, it does.

"Q. What is that?

"A. Well because one is competitive against the other. That [is] if a self-service meat department were open at night without benefit of help it would become

necessary that the service market be open likewise." (Emphasis supplied; R. 604.)⁹

The chief spokesman for petitioners, in a letter to the members of his union replying to newspaper articles which were critical of the union's opposition to evening hours, expressed the following views:

"A very few greedy chain stores in Chicago and suburbs who only want to squeeze *the small operator to death* are now screaming that in the interest of 'Mrs. Housewife' they must keep their meat markets open at night.

"True American ideals call for a free enterprise system wherein our members should have rightful opportunity of some day owning their own business. Under the selfish chain store plan this becomes next to impossible because they are attempting to 'gobble up' every possible last dollar from the consuming public." (P. Ex. 2, 2x.)

When these statements were read during the trial, Mr. Kelly elaborated upon them as follows:

"I meant by that, that a working butcher paid for wages, assuming he was a good butcher, got good wages, saved his money, might some day accumulate enough to make a down payment on a butcher shop and open his own store. *I had hoped that the business world should be so regulated that my members could have the opportunity of readily progressing from the employee class to the owner class.*" (See in expanded form R. 95-96.)

Petitioner Niclubowsky, representing two of the locals flatly confessed an intention to soften competition between the so-called "chains" and so-called "independents" (several of whom operate more than one store R. 607-609), say-

9. Note the admission that a self-service market can operate, at least for limited evening hours, without employees (butchers or otherwise), being on duty in the meat department.

ing "We are going to protect the independent fellow" (R. 557).

Finally, the union's concern with profits is confessed in the following revealing passage from Mr. Kelly:

"When we have seven nights, which, if Jewel is successful, we ultimately will have, *then nobody profits*, and those who cry the loudest will be the first to want out." (R. 131.)

We do not think that Mr. Kelly's prediction of seven nights, save in atypical communities, is correct, but his objective of stabilizing profits for market operators is apparent.

In the earlier stages of the case petitioners boldly argued that the unions had an "interest in preventing dislocation of the equilibrium between service and self-service markets" (Br. for Appellants on first appeal, Court of Appeals, p. 55). The thrust of the theory was that if self-service markets were open at night without butchers on duty they would probably attract trade that otherwise might go to a service market. As the anti-trust significance of this argument became apparent (S. Ct. 38), it has been relegated to a minor position by petitioners (Br. p. 70 and, of course, is not adopted by the Solicitor General. Whether there ever was any economic validity to this view is not clear. It is by no means certain that customers of a service market would not still prefer service rather than self-service regardless of hours. In any event, the objective of the unions was not a true labor objective, but was to protect the less efficient or less pleasing operator against the competition of one who better pleased the public.

SUMMARY OF ARGUMENT.

Almost any business action taken by an employer can be shown to have at least some effect upon profits of the business and upon terms and working conditions of its employees. If unions and employers were to be immune from the Sherman Act when they combine to restrain commercial trade, there would be no respect in which the national anti-trust policy would be safe from assault by such combinations, for in nearly every instance both the firm and the union members can be shown to receive at least an indirect benefit from the restraint.

The necessity of protecting the market and consumers against the anti-competitive tendencies and temptations resulting from the unionization of all workers in a product line is greater today than ever before. The exemption of labor unions from full operation of the Sherman Act must be found in the statutory provisions of the Clayton and Norris-LaGuardia Acts, and those enactments limit the exemption to activities directly concerning terms and conditions of employment. "Market operating hours" is a condition of the business rather than a term or condition of employment.

The unbroken line of authority extending from *United States v. Brims*, 272 U. S. 549 (1926), most fully explicated in *Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797 (1945); and running through the instant cases, demonstrates not merely that the Court has never wavered from its view that unions cannot combine with businessmen to restrain commercial competition, but demonstrates also the necessity of adherence, in the public interest, to that view.

The Solicitor General's attempt to create classifications and categories of exemptions for commercial restraints mutually arranged by firms and unions would devitalize the *Allen Bradley* doctrine; the categories and tests are imprecise, illogical and would be impossible of judicial administration, for essentially they involve an inquiry into motivation in lieu of an objective test as to market restraint. Moreover, whether the Sherman Act should be further relaxed in favor of unions is a question for the Congress, not the Courts.

The inappropriateness of "primary jurisdiction" over antitrust cases involving labor unions in the National Labor Relations Board is conclusively demonstrated in the Solicitor General's brief.

ARGUMENT.

Introductory.

Almost any business action taken by an employer can be shown to have at least an indirect effect upon the profits of the business and the wages, hours or working conditions of its employees. If unions and employers were to be immune from the Sherman Act when they combined to restrain commercial trade for their mutual benefit, or for the benefit of one of them, there would be no respect in which the national antitrust policy against restraints upon competition would be safe from assault by combinations involving labor unions.

Recognizing that Congress had intended to confer no such sweeping immunity upon labor organizations and persons acting in concert with labor organizations, the Court of Appeals held that the antitrust exemption of labor when negotiating industry-wide agreements with employees is limited to bargaining directly upon terms and conditions of employment, and such additional provisions as may be necessary to protect those terms and conditions. In so deciding, the Court of Appeals, no matter how emphatic its language, promulgated no new doctrine but merely followed *Allen Bradley v. Local Union No. 3*, 325 U. S. 797 (1945).

This Court repeatedly has ruled that labor's exemption from the Sherman Act is not a general one but is a limited statutory exemption of activity "concerning terms or conditions of employment." The words "of employment" are a limitation upon the words "terms" and "conditions". Labor is not given an exemption to engage in restraints concerning conditions of the business itself, even though such conditions may have an effect upon the wages or hours or schedules of work that labor bargains for. (*Apex Hosiery*

Co. v. Leader, 310 U. S. 469 (1940); *Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797 (1945)).

Presented within the four corners of the contracts at bar are wholly legal and exhaustive provisions as to wages and hours of employment, together with the marketing clause which, as the Solicitor General admits, "undeniably restricts commercial competition in selling meat by limiting the hours at which meat may be sold even at self-service counters and stores" (S. G. 14-15). The line between the two classes of contractual provisions is clear, and while petitioners and the Solicitor General chide the Court of Appeals for expressing what is *outside* of the labor exemption in the terminology of "proprietary function," that terminology, taken in context, is merely another way of referring to matters other than "wages, hours and conditions of employment" which were called "entrepreneurial questions" or "prerogatives of private business management" by the concurring Justices in *Fibreboard Paper Products Corporation v. National Labor Relations Board*, No. 14 this Term.

There is no problem here of protecting a union wage or hour scale against non-union scales such as underlay *Duplex Printing Press Co. v. Deering*, 254 U. S. 443 (1921), *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (1922), *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295 (1925), *United States v. Brims*, 272 U. S. 549 (1926), *International Brotherhood of Teamsters v. Oliver*, 358 U. S. 283 (1959), and, although the question was not posed in an anti-trust posture, *Fibreboard Paper Products Corporation v. N. L. R. B.*, No. 14 this Term; neither is any other group of workers, organized or unorganized, seeking to take over the butchers' work as was the nature of the controversy underlying *United States v. Hutcheson*, 312 U. S. 219 (1941); nor is there a failure to bargain over employment security such as was involved in *Telegraphers v. Chicago & N. W. R. Co.*, 362 U. S. 330 (1960).

All that is involved, whatever may have been the Court's impression at the time it granted certiorari, is a situation in which a group of affiliated local unions, having an admitted monopoly of the supply of butchers in the Chicago area (R. 90-128), dealing with a large number of entrepreneurs in a competitive situation much as Local No. 3 of the Electrical Workers Union dealt with electrical contractors in New York (*Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797 (1945)), after making a contract fully fixing wages, hours and conditions of employment, went beyond a labor agreement to make one inhibiting the degree of competition in the product market.

We respectfully suggest that one way of emasculating the Sherman Act insofar as it pertains to union activities is to misconstrue the law; another way is to construe the law with a reasonable degree of correctness but refuse to face the facts of any case which requires its application. We respectfully suggest that the opening sentence of the Solicitor General's Introductory Argument poorly conceals his antipathy to the Sherman Act as applied to labor unions, and that presentation for the United States suffers from its refusal to face the facts of this record.

I.

**THE MARKET OPERATING HOURS CLAUSE VIOLATES
THE SHERMAN ACT.**

A.

The Sherman Act Applies to All Contracts, Combinations and Conspiracies of Labor Unions to Restrain Competition in the Product Market; Only Contracts or Activities Directly Concerning Wages and Conditions of Employment Are Exempted by Either the Clayton or the Norris-LaGuardia Act.

The necessity of protecting the market place and consumers against the anti-competitive tendencies resulting from the unionization of all workers in a product line is greater today than ever before.

The country has witnessed in the last twenty-five years a tremendous increase in the complete, or virtually complete, unionization of workers in complete lines of product activity. The Solicitor General agrees (p. 14) that "labor-management negotiations have increasingly come to involve many or even all of the firms competing in a product market and extend to restrictions upon commercial competition among employers which would plainly violate the antitrust laws if imposed by the business firms acting in their own interests * * *." The observation could scarcely be put more forcefully, but to it we suggest should be added the fact, made clear in this record, that in many instances the negotiations, as here, involve not only "many, or even all, of the firms competing in a product market," but, on the other side, a single union or its equivalent, a group of affiliated unions, as here, acting as a unitary force. The opportunity and the temptation thus not only are ever present, but are growing, for the firms or the unions, or both, to suggest that the selfish interests of the firms and

the members of the union can best be served by non-competitive commercial practices at the expense of the consuming public. That this is violative of the intrinsic core of the Sherman Act is apparent. The present is no time to relax antitrust inhibitions on industry-labor combinations that have power to oppress consumers.

In *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940), in answer to a contention that Congress intended to exclude labor organizations and their activities from the operation of the Sherman Act, the Court said at pages 487 and 488:

“ . . . To this the short answer must be made that for the thirty-two years which have elapsed since the decision of *Loewe v. Lawlor*, 208 U. S. 274, this Court, in its efforts to determine the true meaning and application of the Sherman Act has repeatedly held that the words of the act, ‘Every contract, combination . . . or conspiracy in restraint of trade or commerce’ do embrace to some extent and in some circumstances labor unions and their activities; and that during that period Congress, although often asked to do so, has passed no act purporting to exclude labor unions wholly from the operation of the Act. On the contrary Congress has repeatedly enacted laws restricting or purporting to curtail the application of the Act to labor organizations and their activities, thus recognizing that to some extent not defined they remain subject to it.”

Moreover, the Court was extremely careful in *Apex* (p. 293) to distinguish the conduct there—a strike, unilateral action, to secure a closed shop which was then a lawful condition of employment—from a contract between a labor organization and employers which restrained commercial competition, distinguishing *United States v. Brims*, 272 U. S. 549, discussed *post*.

And if there could remain any doubt that unions, either acting alone, or in conjunction with business, are not

wholly immune from the Sherman Act, even after adoption of Norris-LaGuardia, it is removed by Justice Frankfurter's observation in *Brotherhood of Carpenters v. United States*, 330 U. S. 395, 413, 414 (1947):

"Before the *Coronado* decision and since, repeated efforts were made to have Congress take trade unions from under the Sherman Law. Regardless of the political complexion of Congresses, these efforts have consistently failed. Equally futile have been efforts to have this Court read the liability of trade unions out of the Sherman Law by judicial construction. This Court undeviatingly held that trade unions are within 'the general interdict of the Sherman Law,' although later enactments have withdrawn specifically enumerated practices of labor unions from the scope of that law."

The "withdrawals" of which Justice Frankfurter spoke are quite narrow, as we shall see

There have been only two legislative enactments partially relieving unions from the operation of the Sherman Act. They are the Clayton Act of 1914 and the Norris-LaGuardia Act of 1932. Although the brief of the Solicitor General does not directly assert that the National Labor Relations Act of 1935, as amended in 1947, was intended to create an exemption to the Sherman Act, the briefs both for the United States¹⁰ and for the petitioners ambivalently and

10. The position of the United States as to the bearing of the National Labor Relations Act in determining the scope of the antitrust exemption is seriously contradictory and confusing. In the Memorandum submitted during the certiorari proceedings, the Solicitor contended (pp. 3-4) that the words "terms or conditions of employment" should receive the same interpretation in Norris-LaGuardia as in National Labor Relations. Point IA of the Solicitor's brief (p. 18) would seem to take the same position. Yet the position is abandoned on page 63, which states, "It would seem, moreover, that there may be positive gains in separating the interpretation of the phrase 'terms or conditions of employment' for the purposes of the National Labor Relations Act from the determination of what agreements between labor unions and

frequently treat it as having at least a bearing upon the scope of the so-called antitrust exemption. We respectfully suggest that not a line of legislative history is, or can be, cited for the proposition that Congress believed it was in any way impinging upon the Sherman Act either in adopting the National Labor Relations Act originally in 1935 or in amending it in 1947.

What we are dealing with is a matter of statutory construction of the Sherman Act as affected by Clayton and Norris-LaGuardia, both of which concededly were designed to afford labor organizations some relief from the Sherman Act. To the extent that the exemption cannot be found in the language of Clayton or Norris-LaGuardia, it does not exist because, "In dealing with problems of interpretation and application of [the Norris-LaGuardia Act, the courts] have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers." *Sinclair Refining Company v. Atkinson*, 370 U. S. 195, 215 (1962).

Section 6 of the Clayton Act (15 U. S. C. 17) provides only that nothing in the antitrust laws shall be construed to forbid unions (and agricultural associations) from "*lawfully carrying out the legitimate objects thereof*." And Section 20 of that Act (29 U. S. C. 52) provides only that no injunction shall be granted in cases growing out of a dispute "*concerning terms or conditions of employment, unless necessary to prevent irreparable injury*," etc.

The Norris-LaGuardia Act is even more explicit. Section 1 of that statute (29 U. S. C. 101) takes from the courts the right to issue injunctions only in cases involving or growing out of a "labor dispute." The term "labor dispute" is defined by Section 13 to include only contro-

competing employers violate the antitrust laws." We suggest the latter statement should serve to undo the complexities created by the earlier ones.

versies concerning (a) "terms or conditions of employment," or (b), in no way material here, "the association or representation of persons" for collective bargaining purposes (29 U. S. C. 113).

And the declaration of policy in Norris-LaGuardia should be considered, for in *United States v. Hutcheson*, 312 U. S. 219 (1941), Justice Frankfurter, one of the draftsmen of the Act, in at least three places (see pages 231 and 234) bottomed the Court's opinion upon references to the Congressional expressions of national policy made in Norris-LaGuardia and used that policy as the touchstone for interpretation of the Act. Reference to the declaration of policy (29 U. S. C. 102) again shows that the purpose of the Act was to assure the individual non-organized worker of the right of self-organization "to negotiate the terms and conditions of his employment."

The words used in both Clayton and Norris-LaGuardia, whether they be "terms and conditions" or "terms or conditions," are qualified and limited by the words "of his employment" or "of employment." That the entire phrases are limitations upon the scopes of the enactments is as apparent here as it was recognized to be by the unanimous decision in the recent *Fibreboard* case with respect to the similar phrase in National Labor Relations Act. That the specification "of employment" limits the words preceding it and excludes everything else, admits of no argument. The statutory phrases cannot rationally be read as "conditions of the business enterprise with which the employee is connected."

The only other place that petitioners can find statutory language creating an exemption is in Section 6 of the Clayton Act, which provides that nothing in the antitrust laws shall be construed to forbid unions (and agricultural associations) from lawfully carrying out the legitimate objects

thereof. It scarcely can be contended that it is a legitimate object of a union or lawful for it to enter into an agreement with employers to restrict competition in the vending of the necessities of life, and no one appears to seriously so contend in the case at bar. *Maryland and Virginia Milk Producers Assoc. v. United States*, 362 U. S. 458 (1960), clearly establishes that Section 6 does not authorize its beneficiaries "to engage in predatory trade practices."

B.

In Construing and Applying the Labor Exemption This Court Has Never Permitted It to Extend Beyond Contracts and Agreements With Employers, or Unilateral Activity, Directly Concerning Terms and Conditions of Employment.

In *United States v. Brims*, 272 U. S. 549 (1926), Chicago manufacturers of millwork, building contractors who purchased such woodwork for installation, and unions whose members were employed by both the manufacturers and the contractors, entered into an agreement (See facts recited in 6 F. 2d 98) fixing terms of employment, hours of labor, and compensation. Beyond that the agreement provided that there was no restriction against the use of any manufactured material except non-union and prison-made. A group of manufacturers in Wisconsin, employing non-union labor at lower wages, theretofore had been selling substantial amounts of millwork in the Chicago market cheaper than Chicago manufacturers who employed union labor could afford to. The object of the combination was to eliminate the Wisconsin competition. The Chicago manufacturers, relieved from the competition, increased their output and profits, more union carpenters secured employment and their wages were increased; nevertheless the Court held that the combination violated the Sherman Act.

We suggest that *Brims* is of significance because, as here, the contract contained both legal and illegal provisions. Unlike the facts at bar, and more favorable to the unions, a definite labor objective was involved, i.e., the protection of union wage scales against competition of non-union workmen working for lower wages. Yet the agreement could not stand. *Brims* was recognized and reaffirmed in *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 501 (1940).

Brims was followed by *Local 167 v. United States*, 291 U. S. 293 (1934), involving restraint of wholesale and retail trade in live and freshly dressed poultry in New York City. In that case wholesalers allocated retailers among themselves and agreed to increase prices, and secured the co-operation of a local union the members of which refused to handle poultry for market men who refused to join the conspiracy. It does not appear that a contract was involved, but it is abundantly clear that a union co-operated with wholesalers and retailers to allocate territories, allocate customers, and to raise prices. This Court, relying in part upon *Brims*, held that an injunction should issue.

In 1941 came the renowned *United States v. Hutcheson*, 312 U. S. 219, from which petitioners (p. 104) lift the truncated quotation that "the licit and the illicit under Section 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." In petitioner's brief this partial quotation is not cited directly from *Hutcheson*; rather, the citation is to *Allen Bradley's* quotation from it. Petitioner's reluctance to come directly to grips with *Hutcheson* is understandable, for in a footnote to a portion of the very sentence on which petitioner would rely Justice Frankfurter reaffirmed the validity of *Brims*.

The facts of *Hutcheson* must be clearly remembered for full realization of the fact that it in no way relaxed, but reaffirmed the established doctrine that unions and employers may not combine to regulate markets. *Hutcheson* arose out of a typical jurisdictional dispute between two unions as to which had jurisdiction over the erection and dismantling of machinery in a construction project. No joint action with any employer or group of employers was involved. The "interest" of each of the competing unions was pursuit of employment for their members.

Against that background Justice Frankfurter said (312 U. S. at 232) "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit * * * etc. and to the first clause just quoted, he appended footnote 3, reading:

"Cf. *United States v. Brims*, 272 U. S. 549, involving a conspiracy of mill work manufacturers, building contractors and union carpenters."

It is quite apparent then that "self-interest" to which *Hutcheson* referred was self-interest limited to a "term or condition of employment" and that the long standing doctrine that labor unions could not combine with non-labor groups to impede or interfere with competition was reaffirmed.

Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797 (1945), is of controlling significance in the case at bar because decided after *Hutcheson* and *Apex*. Its facts parallel those at bar (indeed, are not as strong in the employer's favor).

Quite contrary to petitioners' contention, neither it nor any other case holds that aiding and abetting employers' violations of the antitrust laws is always the *sine qua non* of a union's antitrust liability. Cases in which "aiding and abetting an employer conspiracy" was a pivotal issue all

involved union activities at least partially within legitimate labor objectives contemplated by the Clayton and Norris-LaGuardia Acts. That is why the question of "aiding and abetting employer conspiracies" became relevant. Only when a union's activities in any given situation deal at least in part with terms and conditions of employment, representation, or evasion of union standards by employers so that the Clayton-Norris-LaGuardia exemption may *prima facie* apply, is inquiry into the "aiding and abetting of employer group restraints" necessary to determine whether the exemption should be withheld or forfeited.

Thus, the question presented in *Allen Bradley* was whether it is a violation of the Sherman Act "for labor unions and their members, prompted by a desire to get and hold jobs for themselves at good wages and under high working standards, to combine with employers and with manufacturers of [electrical] goods to restrain competition in, and to monopolize the marketing of, such goods" (325 U. S. 798). Parallels between *Allen Bradley* and the instant case are striking and significant. In both cases the union or unions were dealing *en masse* with numerous competing employers. In *Allen Bradley* an objective was to eliminate competition from manufacturers outside of New York; here an objective is to restrain competition in convenience of marketing hours.

Comparing the *Allen Bradley* facts and contentions with those at bar, we find that petitioners here repeatedly assert that the unions were acting in "their members' self interest"; but in *Allen Bradley* the union advanced the same argument and showed that jobs for the Local members were multiplied " * * * wages went up, hours were shortened" by the restraints involved (325 U. S. at 800). The repudiation of the union contention in *Allen Bradley* demonstrates that the mere fact of "self-interest" (even

if "self-interest" be assumed in the case at bar) does not legalize the restraint involved.

Petitioners and the Solicitor General assert again and again that the restriction on market operating hours is solely the result of union aggression. Thus, petitioners' brief argues that "the surrender of the employers to the unions' demand can hardly be equated with the connivance of the employers with the unions. Capitulation is not conspiracy." (p. 96.) But the identical argument was rejected in *Allen Bradley*, where the union argued and the District Court's approved finding found " * * * the union was the actuating party instead of the manufacturers or employers" (41 F. Supp. at 750), and it was "the dynamic force which had driven the employer-group to enter into the agreement" (325 U. S. at 820). The holding in *Allen Bradley* makes it clear that it is immaterial whether a restraint is originated and perpetuated by a union rather than by an employer. Whether the employers "surrender," as in *Allen Bradley*, or joyously embrace the restraint is irrelevant.

Here petitioners talk out of both sides of their mouths—their lawyers say the unions were the aggressors, but Emmett Kelly, Secretary of the dominant Local testified, "We accepted the majority of industry proposal," (R. 139) and that he protested vigorously at placards in plaintiff's stores which placed the "onus" of the restraint on the union (R. 110). He says the restraint or closing at 6:00 P.M. is "Pursuant to an industry-union agreement" (R. 110). Since an agreement on such a subject, is illegal it is not material who was the initiator.

Petitioners present a variation of the same contention in asserting that they "acted alone," implying that this would be of legal significance, by quoting the following language from *Allen Bradley*:

"Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." (325 U. S. at 810.)

Taking this statement entirely out of context, petitioners argue that it means that so long as a trade restraint is the result solely of union activity, it is legal. But this is not at all the proper meaning of this quotation:

At the time that *Allen Bradley* was decided (1945), it was lawful pursuit of a recognized labor objective of increasing the work of their fellow members for union members to refuse to work on any products not made by their fellow members. (The boycott provisions of the Taft-Hartley Act were then two years in the future.) Thus, when the Court pointed out that the same boycott effect—an exclusion of Allen Bradley products from the New York market—could be achieved solely by union action, it was referring to the fact that by means of its members' refusal to work on "unfair" products, the union could have achieved unilaterally the same result it did achieve by enlisting or coercing employer agreement; and in such event it then would have been protected. Note, however, that price fixing and market control which the Court noted were not "terms and conditions of employment" (325 U. S. 799-800) were forbidden because the union could not enforce prices or control the market even "acting alone." (See decree in *Allen Bradley Co. v. Local Union No. 3*, 164 F.2d 71, 73-74 (2d Cir., 1947).)

In creating or aiding in the market hours restraint here, petitioners stand in precisely the same situation as did the *Allen Bradley* union with respect to the price fixing agreement. The union in neither case could enforce the improper restraint without employer cooperation (voluntary or coerced) and were, and are, wholly dependent upon it. Just

44
as the *Allen Bradley* union could not, "acting alone," fix prices, so here the unions "acting alone," cannot lawfully prevent the public from selecting meat from the employers' self-service cases after 6:00 p.m. Both restraints necessarily involve the agreement and participation of employers; and whether that agreement be willing, or coerced, is immaterial because it is a combination in restraint of trade as *Allen Bradley* plainly holds. Moreover, the unions at bar are in an even more difficult position than was that in *Allen Bradley*, for in seeking to have its members work only on union made material, the *Allen Bradley* union was pursuing a recognized union objective. But here, regulation of hours within which entrepreneurs will compete has never been recognized as an exempt union objective.

The fact that an agreement is secured through the process of collective bargaining does not necessarily immunize it from the Sherman Act as counsel assert. This asserted defense was specifically rejected in *Allen Bradley*. Neither that case nor any other, holds that the bargaining room is a sanctuary in which unions and employers safely may enter into agreements to restrain trade. It simply is not true that because an agreement is collectively bargained it necessarily is a lawful (or an unlawful) agreement. *Allen Bradley* stands for the proposition, therefore, that a collectively bargained agreement which goes beyond terms and conditions of employment to impose restraints of trade is not within the labor exemption and the illegal portions thereof may be stricken down.

To this line of unbroken authority must be added *United States v. Employing Plasterers Association*, 347 U. S. 186 (1954), and *United States v. Employing Lathers Association*, 347 U. S. 198 (1954), which show the continuing vitality of *Allen Bradley*.

There remain for consideration the Court's subsequent

decisions in *International Brotherhood of Teamsters v. Oliver*, 358 U. S. 283 (1959), and *Telegraphers v. Chicago & N. W. R. Co.*, 362 U. S. 330 (1960). Although neither of these cases involved the Sherman Act they are relevant. *Oliver* directly involved wages and hours of truck drivers, and an effort by a group of trucking operators to defeat the union wage scale by a species of sub-contracts. The central matter at issue thus was terms and conditions of employment. *Telegraphers* involved a refusal of the railroad to negotiate about the security of employment of telegraphers and that subject was squarely held to be a "term or condition of employment." Both of those decisions, and at this Term, the decision in *Fibreboard*, are consistent with the view that "terms and conditions of employment" means only what it says in both Clayton and Norris-LaGuardia.

We suggest that this Court, variously composed as it has been from the date of *Brims*, 1926, to the present, would not so consistently have held to the theory having its fullest expression in *Allen Bradley* if the theory was not fully in accord with proper interpretation of the Sherman Act. The fact that cases of this general type have arisen steadily over the span of years shows that there is a continuing threat to the well-being of a competitive economy that cannot be ignored. The vast expansion of multilateral collective bargaining in recent years shows that the *Allen Bradley* doctrine poses no threat to what, for want of a shorter term, we call the legitimate objectives of unions or to multilateral bargaining. At the same time the expansion of multilateral bargaining expands the temptation to engage in anti-competitive deals and dictates that the *Allen Bradley* doctrine neither be abandoned nor nibbled away bit by bit.

II.

THE LABOR EXEMPTION AS NOW CONSTRUED HAS NOT HAMPERED MULTI-EMPLOYER COLLECTIVE BARGAINING AS TO TERMS AND CONDITIONS OF EMPLOYMENT. ANY FURTHER RELAXATION OF THE SHERMAN ACT WOULD BE TO THE VAST DETRIMENT OF THE PUBLIC.

It is difficult to understand precisely where the briefs for the American Federation of Labor and Congress of Industrial Organizations and for petitioners would draw the line between union conduct exempt and non-exempt from the Sherman Act. The argument for petitioners goes so far as to state that, "Even within the area of commercial competition, absent union abetment of a business men's conspiracy to violate the antitrust law, union activity conducted by a labor organization in its self-interest is immune from the Sherman Act." And this would be true even if the conduct was " * * * a restraint upon commercial competition" so long as acting "independently of aid to a business men's combination the union exerted its own bargaining power to serve its own end" (pp. 61-62). If we read this amazing contention aright, petitioners are contending that in a situation such as that at bar, or in countless other situations of multi-employer collective bargaining in which multiple employers, strong and weak, but genuinely competitive in their commercial practices, bargain with a massive union, the union, seeking a larger wage increase than the then economic circumstances of the employers permitted, could insist that all of them agree on a price increase sufficient to yield the desired wage level. So long as the union went through the form of collective bargaining it would be immune, and, of course, if it were immune, so also would be the employers.

It is quite evident that this theory would utterly destroy the Sherman Act. Businesses cannot operate without employees, and so large a percentage of employees today are

unionized that the device we have outlined, with the allure-
ment of increased profits and increased wages, would be
irresistible. And the same technique could be applied to
allotments of territories, entries into the field, mergers, or
countless other things, all yielding economic benefits to the
participants but destructive of a free, competitive economy.

The consequences just sketched are by no means far-
fetched. If the findings of the District Court in the *Allen
Bradley v. Local Union No. 3*, 325 U. S. 797 (1945), at 41 F.
Supp. 727, be consulted, it will be seen that something not
much different occurred there. In *United States v. Brims*, 272
U. S. 549 (1926) the reports do not clearly indicate whether
the unions or the business men were the initiators of the
scheme but "as usual under such circumstances, the public
paid excessive prices" (p. 552). In *United States v. Employ-
ing Plasterers Ass'n.*, 347 U. S. 186 (1954) and *United States
v. Employing Lathers Ass'n.*, 347 U. S. 198 (1954), essen-
tially the same technique was used. In every instance,
the consumer was the victim. If petitioners' proposal were
accepted, the country would be headed for an inevitable and
endless wage-price spiral.

It is nothing less, we respectfully submit, than effrontery
for petitioners to suggest that any such state of affairs
would be wise policy, and even greater effrontery to suggest
that this Court has the right seriously to entertain a pro-
posal so to legislate the Sherman Act out of effective ex-
istence. Nor is there any reason to believe that it will.

If we turn from this shocking proposal to a consideration
of the actual facts of the case at bar and the supposed
problems of Chicago butchers with respect to their work-
ing conditions, it is apparent that the unions' power to bar-
gain for their members *within the confines of antitrust-
labor policy as it is now understood* is ample to assure the
individual butchers that their desire to earn a livelihood

under suitable wages and working conditions can be attained fully, and was here attained, without the inclusion of the market restraint.

The simple fact is that although the International Union, of which the Locals at bar are a part, has butchers organized the length and breadth of the land, most of them, including all of them in Illinois except in the Chicago area, have no objection to evening sales of meat, and this obviously, is to the advantage of the butchers themselves for it means that fewer people are driven to use meat substitutes and therefore more work is available for meat cutters.

It is equally obvious that every possible labor objection that might be urged against the evening sale of red meat can be urged against evening sales of poultry. Nevertheless, fresh poultry, wrapped in containers identical to those used for fresh meat and displayed in the same self-service cases, may be sold, together with smoked meats and other meat items, "provided that union members stock the cases before 6:00 p.m." (1957 contract, R. 47).

Collective bargaining as to terms and conditions of employment gives the unions and their members ample opportunity to negotiate for suitable rates of pay and suitable hours of work and times of employment, to protect their work jurisdiction, and to protect their work loads through suitable enforceable contracts (*Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957)). The inability of the unions to demonstrate any difficulty in these fields either before or during the long time this case has been pending demonstrates that the unions have no need for a license to violate the Sherman Act in order to protect wages, hours and working conditions of their members. And whatever may have been the fears of butchers when self-service was an innovation, the statistics

at page 7, *infra*, demonstrate that through increased productivity and lower overhead it has expanded job opportunities.

III.

THE PROPOSALS OF THE SOLICITOR GENERAL HAVE NO BASIS IN LAW, WOULD BE UNWORKABLE AND INVITE ABUSE. IN ANY EVENT, WHEN APPLIED TO THE FACTS IN THE INSTANT CASE THEY REQUIRE AFFIRMANCE OF THE COURT OF APPEALS DECISION.

In stating his concepts concerning the scope of labor's exemption from the antitrust laws, the Solicitor General quite properly rejects the unions' radical theory that agreements in restraint of trade between unions and others are automatically exempt from the antitrust laws whenever the unions deem such restraints to be in their members' best interest.

Recognizing the threat to the national antitrust policy which would stem from adoption of the unions' contention, the Solicitor General notes that there are certain classes of restraints which, although they might confer a benefit upon labor union members, are nevertheless subject to the antitrust laws.

Where we differ with the Solicitor General is in his proposed definition of the scope of the labor exemption, and in his misapprehension of the facts in the instant case.

In his brief (S. G. pp. 27-55), the Solicitor General creates various categories of collective agreement provisions and declares which of the categories he considers within the labor exemption.

The manner in which the "categories" are organized in the brief, with argumentative discussion and various qualifications to certain of the categories interpolated, causes considerable difficulty in understanding whether he considers

certain agreements subject to the antitrust laws because they fall into a non-exempt category or whether the exemption is inapplicable because the agreement is within a qualification to one of the categories he would create." We may be pardoned the observation that the learned servant has undertaken the impossible task of postulating all conceivable economic interactions in an exceedingly complex system and fitting them into three families, subject to drop-outs, within a few pages of a brief, all without benefit of economic evidence. The effort, if to be made at all, should be made before the Congress, not here. However, despite the imprecise delineation of the categories and qualifications of presumed exempt and non-exempt agreements, we believe the following comments show the unwisdom, from a judicial viewpoint, of his approach:

1. *The First Category.* It appears to be the Solicitor General's opinion that agreements which fix wages, hours and other conditions of employment directly, and restrain commercial competition only indirectly or incidentally, are exempt from the anti-trust laws unless either (a) the unions operate their own businesses and use their leverage to injure the business of their competitors, or (b) the unions and employers are engaged in an independent conspiracy to restrain competition in the employers' line of business and were utilizing a collective agreement as a means to implement that conspiracy. Whatever the merit of his viewpoint,

11. At pages 25, 26 and again at page 52 of his Brief, the Solicitor General lists three proposed "classifications" of collective bargaining agreements, but argues (pp. 27 and 37) as to only two "categories." The third of the classifications is similar to an exception to the second of such categories, described at page 45 of his Brief, except for the fact that in the third classification the Solicitor refers to restraints which benefit employees by enabling employers to increase "the earning power of the business" and in the third qualification to the second category he refers to restraints which would yield benefits to employees through "increased market power" of their employers. We are unable to perceive what distinction the Solicitor is seeking to establish.

this category of activity, obviously, is not relevant in the instant case. The selling hours restriction herein is not a direct regulation of wages, hours or terms of employment, for all of those subjects were dealt with elsewhere in the agreement.

2. *The Second Category.* The Solicitor General urges that agreements which regulate hours, work schedules and assignments but which also operate as "direct restrictions upon competition in the product market" should nevertheless be held exempt except where "it appears that the stipulation [restraining competition] is essentially a device for manipulating the product market in the employers' interest." (S. G. pp. 37, 41.) The Second Category is plainly an effort to erode *Allen Bradley*.

Few agreements are made save for a mutuality of interest. There must be an objective standard for determining when a direct restraint on competition, which confers benefits upon both parties is exempt from the antitrust laws if it is to be exempt at all. No test can properly be one of "specific intent" for two reasons, i.e., because specific intent is generally difficult to prove, and, more important, because it is likely that in a substantial number of situations unions will be motivated by dual intents. Surely, to the extent unions intend to restrain, not competition between workers but between entrepreneurs as well, they intend the consequences of their acts and are deliberately manipulating the commercial market place. If that is not to be law there are numerous activities of business groups, heretofore thought vulnerable to the Sherman Act, that would become immune.

The Solicitor General further suggests that to bring a case within his third qualification "there should be independent proof, beyond any inference that might be drawn from the agreement itself, showing that the contract is essentially a

device for manipulating the market." (S. G. p. 46.) Where a restraint of trade is effected by a collective agreement that is *unnecessary* to attainment of benefits sought by labor, it can competently be found that the contract was, *as here*, at least in part a device for manipulating the market. To require "independent proof" is to make the third qualification a restatement of the second qualification to the posited second category, for it would require proof of an independent conspiracy in restraint of trade. We submit that an "unnecessarily broad restraint" is equivalent to an "independent restraint" in economic and legal effect.

Nevertheless, if the Solicitor General would require evidence apart from the agreement itself, this is one of the fortunate cases in which the complainant was able to obtain such in the words of the union officials themselves. They acknowledged that the unions were attempting to favor and protect small retailers in competition with larger ones and so to regulate the retail meat industry that a butcher might progress with the maximum facility from an employee to an employer.

The Solicitor General concedes that where unions bring employers together in a price-fixing agreement in the expectation that increased profits will yield a treasury which can be tapped for higher wages, the unions are beyond their exemption. By this concession, we submit that the Solicitor General has made inevitable his ultimate acceptance of the Court of Appeals' position, *i.e.*, that labor is beyond the scope of its exemption when it restrains trade beyond what is essential to fix terms and conditions of employment. In adverting to price-fixing the Solicitor General has simply stated *one example*, among many, of restraints which, although yielding a benefit to labor, involve also a gratuitous and unnecessary restriction upon competition. There is no logical reason why it is any more an illegal restraint for unions to create price-fixing agreements for the purpose of in-

creasing their wages than for unions; as here, to create contracts whereby employers agree to refrain from competition among themselves in the hope that union working hours will be affected. Logic dictates the contrary, for in the instant case, the unions were already quite satisfied with the working hours they had negotiated; so that there was *no labor objective* remaining to be attained by the selling hours restriction; that restriction was nothing but a gratuitous, naked restraint of trade. In the price-fixing situation posed hypothetically by the Solicitor General, it could at least be said by the unions that they were not yet satisfied with their wages and there did remain a wage objective to be attained.

It is an inevitable conclusion that if antitrust and labor policies are to be reconciled without stultifying or subverting either, labor's exemption should be declared limited to instances in which (a) unions bargain, or engage in collective activity bearing directly, upon terms and conditions of employment or (b) where a direct restraint of trade is necessary for protection of the aforesaid objectives (*Oliver*), and such restraint goes no further than that.

That standard is, should be, and consistently has been the law. Under this test, labor's exemption from the antitrust laws would apply to protect unions to the full extent intended in the Norris-LaGuardia and Clayton Acts. So long as they bargained concerning terms and conditions of employment, the fact that their collective activity or agreement operated additionally as a restraint of trade would not subject unions to prosecution under the antitrust laws.

Applying this test to the instant case, the Court of Appeals found, and that finding is undisturbed herein, that the market hours restriction constituted an unreasonable restraint upon competition.¹¹ Since that restraint was not necessary in the interest of regulating working hours,

a subject which was fully handled elsewhere in the agreement, that restraint should not be exempt from the anti-trust laws.¹²

The complex realignment of the law the Solicitor General suggests, with its subjective tests and impossible inquiries into, and supposed determinations or balancing, of motivations, would be impossible of administration. How a trial judge could convert the Solicitor's suggested theories into workable jury instructions we fail to see.

IV.

THE NATIONAL LABOR RELATIONS BOARD HAS NO PRIMARY JURISDICTION OVER THE CONTROVERSY.

There is nothing of substance we can add to the definitive and comprehensive presentation of the Solicitor General on this subject. In view of the fact that the General Counsel of the National Labor Relations Board has joined the Solicitor General in the brief and disclaimed the jurisdiction which petitioners would confer upon his agency, we submit the subject should be closed.

11. Observe that the Court denied certiorari on proposed question 3.

12. The unions and Solicitor General urged that the operating hours restriction also had some relationship to job security. These contentions are patently unsupported by the facts. Jewel offered to operate self-service counters during the evening with no employees on duty. If to do so might result occasionally in disarranged packages and untidy refrigerated cases during the evening, Jewel was willing to accept the consequences. While Jewel was willing to employ butchers in the evening to attend refrigerated self-service cases, it was also willing to operate without butchers on duty if the butchers desired not to work.

Analysis of the economics of the situation shows that far from threatening jurisdiction of butchers or their job security, the removal of the restriction upon night operating hours would have the effect of increasing the number of butchers who might find employment and their jobs could be done during daytime hours to prepare packages for evening self-service selling. We can see no way in which jobs would be lost to butchers if the restriction were removed.

CONCLUSION

Although, in the nearly 75 years it has been on the books, the Sherman Act has been the cornerstone in the flowering of an economy that has brought the greatest good to the greatest number of people in all history, labor's attack upon it continues unabated without recognition that the conditions which underlay *Loewe v. Lawlor*, 208 U. S. 274, have long since ceased to exist, and without recognition that the conditions leading to *Norris-LaGuardia* have long since ceased to exist. We now have federal statutes establishing fair minimum wage and hour standards, implemented further by the Walsh-Healey standards for work under government contracts. We have a National Labor Relations Board to enforce workers' rights to organize and to bargain. In short, whatever may have been thought to be the legal or economic disadvantages that entitled workers in 1908 to complain that the Sherman Act stood in the way of their self-betterment, those disadvantages not only no longer exist but have been replaced by special advantages.

Yet petitioners, and to a substantial degree the Solicitor General, say the Sherman Act should be further relaxed as to labor organizations and that this should be done to promote collective bargaining. Collective bargaining is not an end in and of itself but is merely the tool or means for reaching an end—the attainment of fair conditions of employment.

The arrogant pretensions of the organizers of a small segment of workers who say they should be allowed, through the device of collective bargaining, to restrain trade in the market place because the restraint may re-enforce wage and hour benefits already attained or produce others, is shocking to the conscience.

This record demonstrates that the power to restrain trade cannot be trusted in the hands of any organized eco-

conomic group or groups. The dominant officer of the petitioning unions testified that even if 85% of the housewives in the Chicago area could not purchase fresh meat save at great inconvenience during the hours of 9:00 A.M. to 6:00 P.M., he still would not know whether there was any necessity for evening operations (R. 133-134). This Court heretofore has recognized that raw and unconfined economic power in the hands of any specialized group inevitably tends to be used callously for the selfish interests of those who possess it, and to the detriment of the general public. Petitioners exhibit that callousness. And the unrealistic, subjective tests suggested by the Solicitor General could not possibly control it.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

GEORGE B. CHRISTENSEN,
FRED H. DAUGHERTY,
38 South Dearborn Street,
Chicago, Illinois 60603,

THEODORE A. GROENKE,
SAMUEL WEISBARD,
111 West Monroe Street,
Chicago, Illinois 60603,
Attorneys for Respondent.

January 8, 1965.

APPENDIX A.

SUPERMARKET NEWS, MONDAY, JULY 27, 1964

Chicago Butchers Will Not Work Nights Whatever Top Court Rules

CHICAGO. — Union butchers will still refuse to work after 6 p.m. in Chicago stores even if the U. S. Supreme Court affirms a lower-court invalidation of a collective-bargaining-agreement ban on the sale of fresh meat here after that hour.

This was told to Supermarket News last week by Emmett Kelly, vice-president of the Amalgamated Meat Cutters and

Butcher Workmen of North America, AFL-CIO, and director of its Chicago Division.

The curfew was ruled illegal in U. S. Court of Appeals here in May by Jewel Tea Co., and the union, joined by the AFL-CIO, is bringing the matter before the Supreme Court, which reconvenes in October.

Jewel Tea's attorney, George Christensen, told Supermarket News last week that, if the high court denies the union's appeal, Jewel will begin selling meat after

6 p.m., which it hasn't done since 1947.

He added, "My understanding is that, after the Circuit Court of Appeals decision, quite a few small independents, particularly in the southern part of the (Cook) county, began to sell meat after hours."

This was true, said Mr. Kelly, but not too many and not for long. Those that did were contacted by union business agents, and after-hours sales were quickly abandoned. There are areas in the southern part of the county, he

added, that are permitted to operate after 6 p.m. by union contract.

Mr. Kelly said, "We'll abide by the decision of the court," should the plea be denied. "All employers will then have the right to sell meat any time they please."

He added, however, it would be sold after 6 p.m. "without the benefit of any butchers being on duty. Butchers won't work without the sanction of the union."

"We have a bargaining issue—the right to sit down and bargain whether or not we will work at all and under what conditions."

"And if they attempt to sell without the benefit of union help, then no one else could handle the meat, including the clerks, as this would be a violation of our contract."

If the decision went against the union, he explained, the meat department could be open to the public seven days a week, around-the-clock. But he said no one could straighten out, restack, do anything in cutting and servicing of meat after 6 p.m. Departments would be a shambles, he predicted.

Locals involved are 189, 262, 320, 546, 547, 571 and 638. The AFL-CIO, said Mr. Kelly, is entering the case as a friend of the court for the second such time in its history.